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AMICUS BRIEF

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1148

ELTRA CORPORATION

Appellant

-against-

BARBARA A. RINGER,

Appellee

BRIEF AMICUS CURIAE OF
INTERNATIONAL TYPOGRAPHIC COMPOSITION
ASSOCIATION AND ADVERTISING TYPOGRAPHERS
ASSOCIATION OF AMERICA, INC.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELTRA CORPORATION

Appellant

No. 77-1188

vs.

BARBARA A. RINGER

Appellee

BRIEF AMICUS CURIAE OF
INTERNATIONAL TYPOGRAPHIC COMPOSITION
ASSOCIATION AND ADVERTISING TYPOGRAPHERS
ASSOCIATION OF AMERICA, INC.

PRELIMINARY STATEMENT

The Action and the Parties

This is a test case brought by a large manufacturer of typesetting equipment, Eltra Corporation, against the Register of Copyright. Eltra seeks to make new law by obtaining copyright protection for the shape of an alphabet and other typographic symbols placed on devices used in conjunction with Eltra equipment. These shapes are not usually noticed by ordinary readers.

The action is in the nature of mandamus and seeks to compel the Register to recognize such copyright by granting

Eltra's application for registration. Amici, unlike the associations of small typographers who buy both equipment and typefaces from Eltra. They use these products to generate pages of composed type for the printer.

Amici are opposed to a attempt to remove signifier and related forms from the public domain through copyright.

The Decision Below

Eltra moves for summary judgment for the relief demanded in the complaint and the Register cross moved for dismissal of the complaint. Relying on the agreement of the parties that there was no genuine issue of any material fact. A 1991 the United States District Court for the Eastern District of Virginia granted the Register's motion and dismissed the complaint. Amici, respectfully submit that the Register was entitled to summary judgment, if only because the shapes of the alphabet and other symbols designed for Eltra are not copyrightable subject matter under the copyright statute. The decision below should accordingly be affirmed.

Interest of amici

The interest of amici is set forth in some detail in the joint affidavit of Walter Dwyer and Charles Muliken submitted in support of amici's motion to file this brief. This

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There are a handful of manufacturers of type
setting equipment.

2 These manufacturers have long been the ma-
jor sources of metal, glass or plastic devices called "type"
"galleys" or "galleys" containing alphabets and other symbols used
in conjunction with their respective equipment to produce
composed text for printing.

These devices are not compatible or interchange-
able as between different equipment.

3 Demand for newly-named designs of alphabets are
promoted by equipment manufacturers and cooperating marketers
to produce at artificial demand by advertising customers (e.g.
advertising agencies, publishers, etc.) As a result advertising are
required to purchase unnecessary duplicates of existing designs
and sometimes even additional typesetting equipment.

4 These designs do not generally differ from
public domain designs in any respect significant to the al-
timate consumer who neither notices nor effectively acts upon
differences in typeface designs.

That copyright would require a set of pages
in the form of a typewriter with the typewriter
against it. Now, however, the only source of a set of
pages is a typewriter. This is the only way to get
their respective content, and it can be said that the
ability of a typewriter to produce a set of pages

QUESTION PRESENTED

Is the shape of an alphabet stored in memory pro-
viding the means for composing and printing text a work of
art or other copyrightable work under the copyright statute

ARGUMENT

1. The Copyright Act of 1909
in this case

The Court is being asked to participate in the making
of new law after the Register of Copyright and Congress have
declined to do so. Indeed, it is submitted that the express
refusal of Congress to protect typewritten material makes
the problem raised in the present case moot after March
1, 1978. In its passage of a comprehensive copyright revision
bill (H. R. 1080) both Congress and the President in
October 19, 1976 Congress specifically expressed its intent
not to protect typewritten material under the new law. See H. R.
Rep. No. 940, 94th Cong. 2d Sess. 11 (hereinafter "House Re-
port"). Section 102 of the new law covers the general subject

... of copyright ... of this ... and the ...
House Committee Report ... is attached. The Report
notes the pertinent category in Section 10 ...
graphic or sculptural work ...
... does not regard the design of typeface ...
copyrightable ... graphic or sculptural work ...
the meaning of this bill ...

The thrust of 1974 Congressional intent in this
gate has been to clarify rather than to contract the pro-
tection available under the 1909 law. See House Report 547.
Undoubtedly Congress has remained of the view that typeface
design is not presently copyrightable. Moreover, a number
of state courts have for some time been relying on developments
in the revision effort as an aid in interpreting the 1909 law.
See, e.g., Google v. United Artists Television, Inc., 425 F.2d
397, 401 (2d Cir. 1970); Williams & Wilkins Co. v. U.S., 487
F.2d 1341 (1st Cir. 1973); aff'd by an equally divided
Court, 401 U.S. 178 (1971); Baltique v. E. Van Sten, Inc.
120 F.2d 19, 13 F.2d 565, 554 (2d Cir. 1977).

The expenditure of resources by Little has been no
less impressive than those it expended in the administrative
and legislative arena. Produced a brief and sub bill of 4
pages arguing not only that the alphabet shapes are copyright-
able but attacking the very of the Copyright Office operation.

on a number of levels. For example, plaintiff claims that the current Copyright Office interpretation is invalid and that the operations of the Office are ultra vires and impede the exercise of the right.

Amici agree to address themselves solely to the threshold question: are alphabetic shapes copyrightable? We do so for a number of reasons.

(1) We believe that the case can and should be disposed of on this central ground so as to avoid confronting unnecessary issues of constitutionality and other policy questions. This focus is consistent with the long-established principle that [courts] might not to pass on questions of constitutionality unless such adjudication is unavoidable. See Rosenberg v. Florida, 359 U.S. 461 (1959); cf. Agnew v. Louisiana, 389 U.S. 127 (1967).

(2) We believe that the appropriate party to present views as to the authority of the Register is the Register herself.

(3) The issue of copyrightability transcends provisions of the authority of the Register. The recently passed copyright law permits an infringement action even without registration so long as the procedural formalities are complied with and the Register is given notice. Pub. L. 94-

that long still in this office the system is now in use
is worked as suggested above. It is in practice a system
manufactured and checked to see if there is any work as
one of many members of printer publisher or printer or publisher
could do so under the new law without testing the authority
of the Register.

§ 101 will accordingly not address themselves to
the subject matter dealing with administrative and constitu-
tional issues. We will concentrate instead on the ques-
tion of copyrightability.

2. Alphabet shapes are not "works
of art or other copyrightable
writings" of an author under
the Copyright Statute

History makes a significant contribution to the
answer to the question presented by this case set forth at
page 6 above. As documented in detail in the Register's brief
and history demonstrates that typewritten designs have never
been deemed copyrightable by Congress. Nor are they now. See

Because of the possibility of their liability under present
law, representatives of the National League of Graphic and
Graphic Publishers, and others, the system for pro-
tection of creative people at our country's government
pages, practice for copyright of the administrative hearing
held before the Register.

House Report, supra at 34

A word is appropriate as to the district court's conclusion on copyrightability. A 501-based opinion admitted and uncontrasted facts, a view which forms the pivot of Eltra's argument in this Court. This conclusion is clearly a conclusion of law, is of course not binding on this Court, which must reach its own conclusions. Cf. Quintile North American, Inc. v. North Carolina National Bank, 528 F.2d 917 (4th Cir. 1975).

We submit that by their nature, alphabet shapes as a class of items do not fit the category of protectible works under copyright. This in no way lessens the efforts of Mr. Zapf or Mr. Parker or minimizes the expenditures of plaintiff; it simply means they are irrelevant. The efforts or expenditures of a Christian Dior for dresses, a Charles Eames for furniture and a Frank Lloyd Wright for a residence are all impressive, but do not convert these items into "works of art". There are many other products which, while attractive, are not considered "art" for the purpose of the copyright statute. Thus in Lechman v. Newburg Le Boulle Dishes, Inc. v. Newburg Dishes, Inc., 133 F. Supp. 912 (S.D.N.Y. 1955), aff'd, 238 F.2d 917 (2d Cir. 1956), Judge Simons held that a wheat sifter did not fall within the category of "works of art". Because wheat sifters are to be considered

with articles -- even useful articles. They are used as calling objects of art. It was the shape of a star considered to be within the ordinary and historical concept of art. In *Bagley & Fiddler v. Fisher*, 144 F.2d 425 (1st Cir. 1948), the court upheld the Register's refusal to register as a "work of art" the shape of a star used as a cardboard frame for a photograph-phonograph record combination.

The shape of a letter should be treated no differently than the shape of a star. Moreover, the precedents are particularly applicable to the present case because of the nature and function of typeface designs. The pertinent Copyright Office regulations, 37 C.F.R. §202.10(c), correctly cover this situation by excluding registration for designs of articles whose "sole intrinsic function" is their utility. The design elements of alphabet shapes are inextricably connected to the function of fonts, grids and other devices in producing effective type. The shapes have no other purpose but to be embodied on devices intended to be operated in conjunction with machines. Cf. *Ex parte Ingham*, 161 F.2d 916 (D.C. Cir.) cert. denied 314 U.S. 694 (1942) (Mandamus for template recording chart denied).

The "sole intrinsic function" of typefaces is their utility. No one joins at typefaces to admire their beauty.

people simply use effective type as a vehicle which to read. This is applicable to the present situation is the questionable conclusion of Judge Cavell in *Esquire v. Ringer*, 314 F. Supp. 119 (D.D.C. 1974), appeal pending, 507 F.2d 1132, that a lighting fixture is a "work of art" because it performs no function during the laytime.* Thus plaintiff's argument attempting to minimize the relationship between type face design and legibility falls of its own weight.

The function of typeface designs particularly calls for denial of protection since shapes of alphabets are the raw material of words and language. The public policy against encumbering our alphabet with claims of private property is supported by cases in many different contexts emphasizing the need for keeping the public domain truly public. See, e.g., *Baker v. Selden*, 101 U.S. 99 (1879). Cf. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 166 F.2d 103 (2d Cir. 1948); *Time, Inc. v. Bernard Geis, Inc.*, 293 F. Supp. 110 (S.D.N.Y. 1968). As stated in *Mogensen v. Procter & Gamble Co.*, 379 F.2d 615, 647 (1st Cir. 1967): "We cannot recognize copyright as a game of chess in which the public can be checkmated."

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* This conclusion is no more valid than the argument rejected in *Vacheron*, supra, that plaintiff's watch must be art because it is "difficult to tell time from it."

Under these principles courts have been alert to prevent appropriation of the basic ingredients of the public vocabulary. For example, in Berlin v. E.C. Publications, Inc., 328 F.2d 541 (2d Cir. 1964) the court expressed a doubt that "even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter." Cf. Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705 (7th Cir. 1972); Smith v. Muehlebach Brewing Co., 140 F.Supp. 729 (S.D. Mo. 1956); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950). To paraphrase, even so eminent a designer as Herman Zapf should not be permitted to claim a property interest in the letter "A".

Plaintiff seeks to avoid the thrust of the foregoing reasoning and authority by arguing that Mr. Zapf's ingenuity transforms the alphabet into a work of art. The product is before the court in Exhibits "A" and "B" to the Parker affidavit (A 36-35). We respectfully submit that this case can begin and end upon a visual examination of this alphabet by the Court.

Plaintiff itself concedes the difficulty of discerning the differences between one typeface and another. For example in the elaborate booklet printed by plaintiff for submission to the Copyright Office (Exhibit "C" to the Parker affidavit), it is stated at pages 40-41 that "to the untrained eye, Times and Plantin [two typefaces] may appear identical."

We thus are faced with a class of work with respect to which the untrained eye or ordinary observer neither perceives nor, we submit, cares about difference. This characteristic of typeface designs in and of itself should mean that copyright is inappropriate. It does mean, among other things, that a court would in all cases be unable to apply the recognized standard of determining similarities and differences for purposes of infringement articulated in Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) as follows: "[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same. That is enough."

The courts have increasingly emphasized the necessity of applying this "ordinary observer" test to the question of copyrightability, as well as to the question of infringement. See, e.g., Vogue Ring Creations, Inc. v. Hardman, 410 F.Supp. 609 (D.R.I. 1976). In L. Berlin & Son, Inc. v. Snyder, 510 F.2d 486, 489 (2d Cir. 1976), the Court of Appeals for the Second Circuit, in an en banc reversal of an earlier decision of a three judge panel, rejected copyrightability in a bank in the shape of Uncle Sam. The Court found differences between that bank and a public domain version which "are not perceptible to the casual observer" (emphasis added).

It is not enough for plaintiff to argue that experts might dissect its alphabet shapes and find them different from others. Indeed, the District Court's observations that Eltra's design is "substantially different" from earlier designs (Findings, A 51) is of no significance, being based on the technical "conceptual principle known as Super Ellipse -- that is, a squared-off circle." (Id.) Copyright cases make many key distinctions between experts and laymen. See, e.g., Funkhouser v. Loews, Inc., 208 F.2d 185, 188 (8th Cir. 1953), cert. denied, 348 U.S. 843 (1954). In Gardenia Flowers, Inc. v. Joseph Marcovitz, Inc., 280 F.Supp. 776 (S.D.N.Y. 1968), the court noted, in rejecting copyrightability for an artificial flower, that "even a botanist's inspection which might reveal an unusual vein pattern in some of the leaves or abnormal stem configuration would be irrelevant."

The ordinary observer standard in no way injects aesthetics into this situation. In Bleistein v. Donaldson Lith. Co., 188 U.S. 239 (1903), the Supreme Court was emphasizing the popular appeal of a circus poster, just as Judge Clark in Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), disclaimed a judicial right to overrule public appreciation of a chimpanzee television character. These cases merely show that where the public perceives and cares, a work should be considered art, irrespective of aesthetic judgments. We sub-

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mit that no ordinary observer would purchase a book because it is set in ORION type

It is true that Section 5 of the copyright statute states that the classes of works such as "works of art" are not exhaustive. But plaintiff has failed to cite any instances in which protection was granted to a work not falling within these classes. And it has been noted in Nimmer on Copyright, §12 21, pp. 47-48, as follows

"The implicit (and sometimes explicit) assumption of the courts and of the Copyright Office is that only such works as are enumerated in Section 5 are eligible for copyright. No reported decision indicates a validation of copyright except where the work in question fits into one of the Section 5 categories ..."

Nor does any other statutory language aid Eltra Goldstein v California, 412 U.S. 546 (1973) stands for the proposition that the term "writings of an author" in Section 4 of the copyright statute is not co-extensive with the term "writings" of "authors" in the Constitution. As stated by Chief Justice Burger "Since §4 employs the constitutional term 'writings,' it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply. However, in the more than 60

years which have elapsed since enactment of this provision.
Neither the Copyright Office, the courts nor Congress has
so interpreted it." 412 U.S. at 947 [emphasis added]

3 The Authorities Cited in Eltra's
Brief Do Not Support Reversal

Brief comment may be made on several matters raised
in the first point of Eltra's brief (pp. 6-18)

1. Professor Hanes's "assertion" referred to on
page 9, n. 6 of Eltra's brief, was "submitted on behalf of the
Mergenthaler Linotype Company", i.e., plaintiff herein, in
connection with the "typeface hearing" held by the Register

2 The history of the 1909 Act, as finally imple-
mented by Hamer v. Stein, 347 U.S. 201 (1954), referred to on
pages 8 and 9 of Eltra's brief, merely demonstrates that a
work may be protected even if it is not a work of fine art.
This does not mean that everything that is not fine art is
protected.

3. Webster's definition of "art" as "the applica-
tion of knowledge or skill in effecting a desired result" quoted
on page 7 of Eltra's brief clearly shows that the word "art"
in the copyright statute cannot be taken in its broadest sense

CONCLUSION


The design in question relates basically to the shape of an alphabet. It is embodied on a device used in conjunction with typesetting machines to produce type. The economic setting of the pertinent industry involved is unusual. The Register of Copyrights held an unprecedented full-scale administrative hearing. Extensive testimony and written submissions failed to convince the Register to abandon the long standing practice of her office to deny registration to typeface designs as expressly embodied in regulations, 17 C.F.R. §202.1(a), and produced the present pending action. Simultaneously, the Copyright Law has been completely revised and Congress has in the words of the House Judiciary Committee, "considered, but chosen to defer, the possibility of protecting the design of typeface" House Report, p. 33 (1976)*. Against this background, it is submitted that

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- A question has even been raised as to whether typeface should be included in a sharply limited form of protection which the House Judiciary Committee has suggested for the 95th Congress House Report at 30. This form of protection, which could incorporate compulsory licensing and other protective provisions unavailable to a court, could be supported by various segments of the industry. Plaintiff's quest for judicial recognition of broad and unqualified protection cannot. That only a legislative solution can provide the delicate mechanism required to balance all economic interests has been repeatedly made clear in copyright cases. See, e.g., Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401, 408 (1968); Grain Processing Co. v. U.S., 427 F.2d 1345, 1348, 1355, 45-2 U.S. 114 (1975).

this Court should affirm the dismissal of this action which
seeks copyright protection for the shape of an alphabet

Respectfully submitted,

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പദ്യരചനയിലെ പദ്യരചന

[illegible]

1. പ്രതിപദനം - ഇത് വാചകത്തിന്റെ അർത്ഥം വ്യക്തമാക്കുന്നതിനായി ഉപയോഗിക്കുന്ന ഒരു രീതിയാണ്. ഇത് വാചകത്തിന്റെ അർത്ഥം വ്യക്തമാക്കുന്നതിനായി ഉപയോഗിക്കുന്ന ഒരു രീതിയാണ്.

The first thing I noticed when I stepped out of the car was the heat. It was a sticky, oppressive heat that seemed to wrap around me like a heavy blanket. The sun was high in the sky, and the air was thick with the scent of dust and exhaust. I looked up at the towering buildings that lined the street, their windows reflecting the harsh sunlight. The noise of the city was deafening, a constant hum of engines and the chatter of people. I felt a sense of disorientation, as if I had been transported to a completely different world. The streets were crowded, and the people I saw had a look of weary resignation on their faces. I tried to make sense of it all, but the more I looked, the more confused I became. The heat, the noise, the sight of the city—it all felt like a puzzle I couldn't solve. I took a deep breath, trying to steady myself, and then I saw it. A small, unassuming building tucked away in a quiet corner of the street. It had a sign that I couldn't read, but it seemed different from the others. I walked towards it, my steps feeling heavy and uncertain. The door was slightly ajar, and I pushed it open, stepping into a cool, dark interior. The air was still, and the silence was absolute. I looked around, my eyes adjusting to the low light. There were shelves filled with books, some of which I recognized from my own collection. A small table in the center of the room held a single lamp, casting a warm, golden glow. I felt a sense of familiarity, as if I had come home. I walked over to the table, my hand reaching for the lamp. As I touched it, a soft light emanated from within, and I saw a small, glowing object resting on the table. It was a key, a simple metal key with a small, ornate head. I picked it up, feeling its weight in my palm. The key seemed to have a life of its own, a story to tell. I looked at it for a moment, then I looked back at the door. The light from outside was still there, but it felt different now, less harsh and more inviting. I turned the key in the lock, and the door opened. I stepped out, the cool air of the interior contrasting with the heat of the street. I looked back at the building, then I looked at the key in my hand. I felt a sense of purpose, a sense of direction. I walked away, the key still in my hand, and the heat still on my skin.

It is a common mistake to think that the only way to avoid the problems of the first two cases is to make the contract conditional on the occurrence of the event. But this is not the case. If the contract is conditional on the occurrence of the event, then the contract is not enforceable. The contract is only enforceable if it is not conditional on the occurrence of the event.

കുറേ അളവിൽ '18' ന്റെ പൂർണ്ണ അളവ് 19 - ക്ക് പറ്റുന്ന ഒരു പൂർണ്ണ 2 ന്റെ ഗുണിതമാകാൻ കഴിയില്ല. 18 ന്റെ ഗുണിതം 36, 54, 72, 90, 108, 126, 144, 162, 180, 198, 216, 234, 252, 270, 288, 306, 324, 342, 360, 378, 396, 414, 432, 450, 468, 486, 504, 522, 540, 558, 576, 594, 612, 630, 648, 666, 684, 702, 720, 738, 756, 774, 792, 810, 828, 846, 864, 882, 900, 918, 936, 954, 972, 990, 1008, 1026, 1044, 1062, 1080, 1098, 1116, 1134, 1152, 1170, 1188, 1206, 1224, 1242, 1260, 1278, 1296, 1314, 1332, 1350, 1368, 1386, 1404, 1422, 1440, 1458, 1476, 1494, 1512, 1530, 1548, 1566, 1584, 1602, 1620, 1638, 1656, 1674, 1692, 1710, 1728, 1746, 1764, 1782, 1800, 1818, 1836, 1854, 1872, 1890, 1908, 1926, 1944, 1962, 1980, 1998, 2016, 2034, 2052, 2070, 2088, 2106, 2124, 2142, 2160, 2178, 2196, 2214, 2232, 2250, 2268, 2286, 2304, 2322, 2340, 2358, 2376, 2394, 2412, 2430, 2448, 2466, 2484, 2502, 2520, 2538, 2556, 2574, 2592, 2610, 2628, 2646, 2664, 2682, 2700, 2718, 2736, 2754, 2772, 2790, 2808, 2826, 2844, 2862, 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1. Einleitung
 2. Grundlagen der Wirtschaftsinformatik
 3. Systemanalyse
 4. Systementwurf
 5. Implementierung
 6. Wartung und Weiterentwicklung
 7. Fazit

copyright protection in the program, and the effect of the law is that it is deemed to be a part of the program and is protected as such.

Section 107(2) states as amended that copyright in computer programs should extend protection to the modifications or programs adapted by the program user, rather than merely to the original program. This is a significant change, for it means that the user of a program is now protected by the copyright law. It is also a change in the way that the law is applied, for it means that the user of a program is now protected by the copyright law. It is also a change in the way that the law is applied, for it means that the user of a program is now protected by the copyright law.

Section 107(2) is an amendment to the Copyright Act, and its purpose is to extend the scope of copyright protection to the user of a program. It is also a change in the way that the law is applied, for it means that the user of a program is now protected by the copyright law. It is also a change in the way that the law is applied, for it means that the user of a program is now protected by the copyright law.